80-1178

Supreme Court, U. S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

AETNA INSURANCE COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWLEY TROXELL ENNIS & HAWLEY
John T. Hawley
P. Craig Storti
Carl W. Harder (Counsel of Record)
P.O. Box 1617
Boise, Idaho 83701
Telephone: (208) 344-6000

Attorneys for Petitioners

Question Presented

Whether Section 3 of the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 702c, provides the United States immunity from liability for its negligence in causing the failure of the Teton Dam, a reclamation project on the Teton River in Southeastern Idaho, when when the project's authorization statute made no reference to any flood control purpose?

List of Parties

This Petition for Writ of Certiorari is filed on behalf of the following Petitioners who appeared as plaintiffs in the proceedings below: Aetna Insurance Company[1], North American Company for Property and Casualty Insurance[2], Highlands Insurance Company[3], Global Aviation Insurance Managers and Brokers, Inc.[4], Sentry Insurance, a mutual company[5], H.R. Rokeby-Johnson, as Representative of those Underwriters at Lloyds, London, Signatory to Policy Nos. JGQ 0205 and JGA 0090, 52561/RC, Preferred Risk Mutual Insurance Company[6],

1. Connecticut General Insurance Corporation is the parent company of Aetna Insurance Company.

2. CIT Corporation is the parent company of North American Company for Property and Casualty Insurance.

3. Halliburton Company is the parent company of Highlands Insurance Company.

4. Coroon & Black, a corporation, is the parent company of Global Aviation Insurance Managers and Brokers, Inc.

5. Sentry Insurance, a mutual company, has no parent companies, subsidiaries, or affiliates.

6. Preferred Risk Life Insurance Comapny is an affiliate of, and Mid-West Mutual Insurance Company is a subsidiary of, Preferred Risk Mutual Insurance Company.

Federal Insurance Company[7], and Motors Insurance Corporation[8].

Separate Petitions for Writs of Certiorari will be filed on behalf of the following, remaining plaintiffs who appeared in the proceedings below: Appalachian Insurance Company, Protection Mutual Insurance Company, Clearfield Insurance Limited, Canners Exchange Subscribers, Warners Reciprocal Insurers, American Mutual Reinsurance Company, Aid Insurance Company (Mutual) and Amco Insurance Company, American States Insurance Company, American Economy Insurance Company, Insurance Company of North America, Recovery Services International, Foremost Insurance Company, John Deere Insurance Company, Tahoe Insurance Company, Mutual of Enumclaw, National General Insurance Company, National Aviation Underwriters, Balboa Insurance Company Millers Mutual Fire Insurance Company of Texas and Millers Casualty Insurance Company of Texas, Guarantee National Insurance Company, Farm Bureau Mutual Insurance Company of Idaho, Mid-America Fire and Marine Insurance Company, Allstate Insurance Company, Allstate Indemnity Company, United Pacific Insurance Company, Reliance Insurance Company, The Travelers Indemnity Company, The Travelers Indemnity Company of Rhode Island, The Charter Oak Insurance Company, North Pacific Insurance Company, Oregon Automobile Insurance Company, Universal Underwriters Insurance Company, Oregon Mutual Insurance Company, Centennial Insurance Company, Northwestern National Insurance Company, National Farmers Union Property and Casualty Company, Old Reliable

7. The Chubb Corporation is the parent company of Federal Insurance Company.

8. General Motors Acceptance Corporation is the parent company of, and CIM Insurance Corporation is an affiliate of, Motors Insurance Corporation.

Fire Insurance Company, Horace Mann Insurance Company, Aetna Insurance Company, Forrest Mutual Insurance Company, Great American Insurance Company, Automobile Club Insurance Company, American Fidelity Fire and Insurance Company, American Modern Home Insurance Company, Farmers Insurance Company of Idaho, Mid Century Insurance Company, Truck Insurance Exchange, Farmers Insurance Exchange, Industrial Indemnity Insurance Company, United States Fire Insurance Company, Nation Wide Insurance Company, Trans America Insurance Company, Unigard Insurance Company, Unigard Mutual Insurance Company, Emmco Insurance Company, American Hardware Mutual Insurance Company, Summit Home Insurance Company, Liberty Mutual Fire Insurance Company, Milbank Mutual Insurance Company, Safeco Insurance Company of America, General Insurance of America, Firemens Fund Insurance Company, National Surety Corporation, The American Insurance Company, West American Insurance Company, J.R. Rokeby-Johnson on behalf of Underwriters at Lloyds London, United States Fidelity and Guarantee Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Harco National Insurance Company, and St. Paul Fire & Marine Insurance Company.

Parties also named as defendants in consolidated actions below are Morrison-Knudsen Company, Inc., Peter Kiewit Sons Co., Morrison-Knudsen-Kiewit, a joint venture, and McCabe Brothers, Inc.

Table of Contents

Page

Question Presented. i
List of Parties i
Opinions Below 1
Jurisdiction 1
Statutes Involved 2
Statement of the Case 2
Reasons for Granting the Writ 4

The Immunity Granted the United States by Section 3 of the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 702c, Applies Only to Congressionally Designated Flood Control Projects, which the Teton Dam Was Not.

1. *The Court of Appeals Erred by Acting Contrary to Decisions of This Court in Examining the Legislative History of the Teton Dam Authorization Act to Find a Flood Control Purpose.* 6

2. *The Court of Appeals Erred When It Stated that Courts Examining the Immunity Granted by 33 U.S.C. § 702c have Disregarded the Language of Applicable Authorizing Statutes.* 10

3. *The Court of Appels Erred When It Applied a Statement from an Earlier Decision Regarding the Flood Control Purpose of the Teton Dam.* 12

Conclusion 13
Appendices. 15

A. Opinion, United States Court of Appeals for the Ninth Circuit, August 14, 1980 15

PREVIOUS PAGE WAS BLANK

B. Memorandum Decision and Order, United States District Court for the District of Idaho, February 23, 1979 22

C. Judgment, United States Court of Appeals for the Ninth Circuit, August 14, 1980 28

D. Order, United States Court of Appeals for the Ninth Circuit, October 14, 1980 29

E. Mississippi River Flood Control Act of 1928, Section 3, 45 Stat. 535, 33 U.S.C. § 702c 30

F. Teton Dam Authorization Act of 1964, Pub. L. No. 88-583, 78 Stat. 925 32

G. Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211 35

Table of Authorities

Cases

Page

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 6

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 12

Burlison v. United States, 627 F.2d 119 (8th Cir. 1980) 12

Callaway v. United States, 568 F.2d 684 (10th Cir. 1978) 11

Caminetti v. United States, 242 U.S. 470 (1917) 7,8

Clark v. United States, 218 F.2d 446 (9th Cir. 1954) 10

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 6

Florida East Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975) 11

Folsom v. United States, 160 U.S. 121 (1895) 7,8

Graci v. United States, 456 F.2d 20 (5th Cir. 1971), *cert. denied*, 412 U.S. 928 (1973) 5

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 7

Iselin v. United States, 270 U.S. 245 (1926) 8,9

Kelleher v. French, 22 F.2d 341 (W.D. Va. 1927), *aff'd. per curiam*, 278 U.S. 563 (1928) 8

Kuehner v. Irving Trust Co., 299 U.S. 445 (1937) 7

Lenoir v. Porters Creek Watershed Dist., 586 F. 2d 1081 (6th Cir. 1978) 11
Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977) 5
McClaskey v. United States 386 F.2d 807 (9th Cir. 1967) 11
Miree v. DeKalb County, 433 U.S. 25 (1977) 4
National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954) 10
Parks v. United States, 370 F. 2d (2d Cir. 1966) 11
Peterson v. United States, 367 F.2d 271 (9th Cir. 1966) 5
Ponderendolph v. Derry Township, 330 F. Supp. 1346 (W.D. Pa. 1971) 11
Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 6
Sixty-Two Cases, More or Less, Each Containing Six Jars of Jam, Etc. v. United States, 340 U.S. 593 (1951) 9
Southeastern Community College v. Davis, 442 U.S. 397 (1979) 6
Stover v. United States, 332 F.2d 204 (9th Cir.), *cert. denied*, 379 U.S. 922 (1964) 10
Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819) 8
Taylor v. United States, 590 U.S. 263 (8th Cir. 1979) 12
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 6
Train v. Colorado Public Interest Resarch Group, Inc., 426 U.S. 1 (1976) 8
Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) 12,13

Statutes

Act of June 22, 1936, Pub. L. No. 74-738, 49 Stat. 1570 10
Act of August 28, 1937, Pub. L. No. 75-892, 50 Stat. 844 11
Act of October 23, 1962, Pub. L. No. 88-253, 77 Stat. 840 11
Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 *et seq.* 3
Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 11
Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1171 11
Mississippi River Flood Control Act of 1928, Section 3, 45 Stat. 535, 33 U.S.C. Section 702(c) 4,5
Teton Dam Authorization Act of 1964, Pub. L. No. 88-583, 78 Stat. 925 2,5,6
Teton Dam Diaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211 3
Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566, 68 Stat. 666 11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

AETNA INSURANCE COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinions Below

The United States Court of Appeals for the Ninth Circuit entererd its Opinion on August 14, 1980, which Opinion has been reported at 628 F.2d 1201 (9th Cir. 1980) (Appendix A). The United States District Court for the District of Idaho entered its Memorandum Decision on February 23, 1979, which Memorandum Decision has not been reported (Appendix B).

Jurisdiction

The United States Court of Appeals for the Ninth Circuit entered its Judgment in this action on August 14,

1980 (Appendix C). The United States Court of Appeals for the Ninth Circuit entered its Order denying a timely petition for rehearing and rejecting the suggestion for rehearing in banc on October 14, 1890 (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The Mississippi River Flood Control Act of 1928, Section 3, 45 Stat. 535, 33 U.S.C. §702c (Appendix E).

The Teton Dam Authorization Act of 1964, Pub. L. No. 88-583, 78 Stat. 925 (Appendix F).

Teton Dam Disaster Assistance Act, Pub. L. No. 94-400, 90 Stat. 1211 (Appendix G).

Statement of the Case

On June 5, 1976, the Teton Dam collapsed, releasing a cascading wall of water that fell upon those persons, farms and businesses downstream on the Teton and Snake Rivers in southeastern Idaho. The Teton Dam had been the principal feature of the Lower Teton Division of the Teton Basin Federal Reclamation Project, under the auspices and jurisdiction of the United States Bureau of Reclamation.

Congress authorized the construction of the Teton Dam through the enactment of the Teton Dam Authorization Act of 1964, Pub. L. No. 88-583, 78 Stat. 925 (Appendix F). The enabling legislation expressly stated that the four purposes of the project were irrigation, power, recreation and conservation. The Act, however, made absolutely no reference to flood control, either as a purpose for its enactment or as a subject of its substantive provisions.

The failure and collapse of the Teton Dam resulted in damage to the property of individuals and businesses, the amount of which damage escalated into the hundreds of millions of dollars. Petitioners are insurance

companies whose insureds' property was among that damaged. Pursuant to insurance policies between them and their insureds, Petitioners have reimbursed their insureds for the losses that the latter suffered as a result of the Teton Dam disaster and have been subrogated to the rights of their insureds.

Congress responded to the Teton Dam failure by enacting the Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211 (Appendix G), which recited the purpose to compensate fully all deaths, personal injuries and losses of property arising from the failure of the dam. Insurance companies, however, were explicitly excepted from recovery under the Act for the payments they had made to their insureds. The Act did provide that an insurance company nevertheless could still exercise "any right of action against the United States to which it may be entitled under any other laws" for payments made to its insureds. 90 Stat. at 1212.

Accordingly, Petitioners filed their claims with the United States Department of the Interior, Bureau of Reclamation, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.*, within two years of the failure of the Teton Dam. Three Petitioners, Aetna Insurance Company, Highlands Insurance Company and North American Company for property and Casualy Insurance, instituted suits in the United States District Court for the District of Idaho on May 8, 1978, pursuant to the Federal Tort Claims Act, having waiting the requisite six months from their filing of claims, July 29, 1977, without a response from the United States Bureau of Reclamation. Thereafter the United States Bureau of Reclamation denied the claims files by all other Petitioners and they each instituted suits in the United States District Court for the District of Idaho pursuant to the Federal Tort Claims Act. The Complaints filed by Petitioners allege, among other bases for relief, that the negligence of the United States caused the failure of the Teton Dam and the resultant damages.

The United States responded to the first three suits filed by Petitioners by filing its Motion to Dismiss, based upon the assertion that the United States was immune from liability through the operation of Section 3 of the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 702c (Appendix E). For the purposes of the motion of the United States, the allegations of Petitioners' Complaints were taken as true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977). After extensive briefing by all parties and oral argument, the United States District Court for the District of Idaho issued its Memorandum Decision and Order dated February 23, 1979 (Appendix B), and denied the United States' Motion to Dismiss. Thereafter, the United States sought and obtained the right to appeal the issue of the immunity afforded by 33 U.S.C. § 702c to the United States Court of Appeals for the Ninth Circuit.

In an Opinion dated August 14, 1980, the Court of Appeals reversed the District Court and held that the immunity granted in 33 U.S.C. § 702c protected the United States from liability for the damages resulting from the collapse of the Teton Dam. Petitioners, joining with all other plaintiffs in the proceedings below, filed a timely Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc, which the Court of Appeals denied by its Order dated October 14, 1980 (Appendix D).

Reasons for Granting the Writ

The Immunity Granted the United States by Section 3 of the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 702c, Applies Only to Congressionally Designated Flood Control Projects, which the Teton Dam Was Not.

The immunity upon which the United States seeks to rely to avoid liability for its negligent design, construc-

tion and operation of the Teton Dam is Section 3 of the Mississippi River Flood Control Act of 1928, which, amidst language focused solely upon flood control projects for the Mississippi River, provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . .

Despite the broad language of the provision itself, courts universally have found that the immunity granted in 33 U.S.C. § 702c only applies when the damages that are the basis of a claim have resulted from the construction or operation of a congressionally designated flood control project. *E.g., Lunsford v. United States,* 570 F.2d 221 (8th Cir. 1977); *Graci v. United States,* 456 F.2d 20 (5th Cir. 1971) , *cert. denied,* 412 U.S. 928 (1973); *Peterson v. United States,* 367 F.2d 271 (9th Cir. 1966). The Teton Dam was not a congressionally designated flood control project.

The Teton Dam Authorization Act of 1964, Pub. L. No 88-583, 78 Stat. 925, contains not one slight reference to flood control. In the first sentence, Congress explicitly provided all the purposes of the Act, and declared in full:

> [I]n order [1] to assist in the *irrigation* of arid and semiarid lands in the upper Snake River Valley, Idaho, [2] to provide facilities for river *power* opportunities created thereby and, as incidents to the foregoin purposes, [3] to enhance *recreational* opportunities and [4] provide for the *conservation* and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. 78 Stat. at 925 (emphasis added).

In perfect symmetry and balance with these four enunciated purposes, the remaining sections of the Act deal

more expansively with each of them, and with no others. Thus, Section 2 deals with irrigation, *id.*, Section 3(a) with recreation, *id.*, Section 3(b) with conservation, 78 Stat. at 926, and Section 4 with power, *id.* The last section of the Act, Section 5, *id.*, authorizes the appropriation of the funds necessary for the construction of the reclamation project.

1. *The Court of Appeals Erred by Acting Contrary to Decisions of This Court in Examining the Legislative History of the Teton Dam Authorization Act to Find a Flood Control Purpose.*

The Court of Appeals disregarded the straighforward language of the Teton Dam Authorization Act and upset the symmetry of that enactment by declaring that the statute had a flood control purpose. Rather than respecting the language of the statute, the Court of Appeals focused upon isolated references to perceived flood control benefits of the Teton Dam during congressional debate on the bills that were the predecessors of the Teton Dam Authorization Act. In so doing, the Court of Appeals abandoned the often-repeated principle of this Court that, in the construction of a statute, nothing is more reflective of the legislative purpose than the precise language of the statute itself. *E.g., Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979); *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976); *A. Magnano Co. v. Hamilton,* 292 U.S. 40 (1934).

The disregard of the Court of Appeals for the expressly enunciated purposes of the Teton Dam Authorization Act also neglects the duty that this Court has recognized for itself "to honor the clear meaning of the statute, as revealed by its language, purpose and

history." *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 566 n.20 (1979). The duty to honor the clear meaning of the statute is especially applicable when the words of the statute examined are the specific purposes enumerated by Congress, rather than other language.

Moreover, this Court repeatedly has acknowledged that courts cannot and must not use, let alone conclusively rely upon, legislative history, or even rules of construction, to declare a specific purpose of a law when the statute embodying that law is plain and unambiguous on its face. *See, e.g., Kuehner v. Irving Trust Co.,* 299 U.S. 445, 449, (1937); *Folsom v. United States,* 160 U.S. 121, 127 (1895). In *Caminetti v. United States,* 242 U.S. 470 (1917), this Court was requested to read into a statute a requirement of pecuniary expectation. Even though the legislative history seemed to indicate that Congress intended such a requirement, this Court refused to depart from the express language of the statute:

> It is elementary that the meaning of a statue must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is withint the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. . .
>
> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. 242 U.S. at 485 (citations omitted).
>
> . . . .
>
> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from . . . any ex-

> traneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. *Id.* at 490 (citations omitted).

Accord, Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819); *Kelleher v. French,* 22 F.2d 341 (W.D. Va. 1927), *aff'd. per curiam,* 278 U.S. 563 (1928). A "clear and unambiguous" statutory provision is one having a meaning that is not contradicted by other language in the same statute.

It is beyond argument that the language of the Teton Dam Authorization Act is clear and unambiguous. Even the Court of Appeals does not say otherwise. Thus, the Court of Appeals did not examine the statute's legislative history generally to determine legislative intent for the purpose of construing or interpreting a statute. Instead, the Court of Appeals has examined and conclusively relied upon preliminary statements in the statute's legislative history specifically to declare flood control a purpose of the statute, something that Congress itself chose not to do.

Although this Court sometimes has said that it may look at legislative history even if the statute is plain and unambiguous upon a "superficial examination," *Train v. Colorado Public Interest Research Group, Inc.* 426 U.S. 1, 9-10 (1976). *Train* and its progenitors, however, never were concerned with a request to add to a statute, especially when the addition would be to the very purposes of the enactment. The concern was always with interpretation of language already present.

Thus, the "plain and unambiguous" rule is especially appropriate in cases where a party attempts to have a court insert what that party alleges the legislature has omitted. *See, e.g., Iselin v. United States,* 270 U.S. 245 (1926); *Caminetti v. United States,* 242 U.S. 470 (1917); *Folsom v. United States,* 160 U.S. 121 (1895). Wrote Justice Brandeis for the unanimous Court in the

landmark *Iselin* case:

> [The language of the statute] is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence may be included within its scope. To supply omissions transcends the judicial function. *Iselin, supra* at 250-51.

Twenty-five years later, Justice Frankfurter, writing for this Court in *Sixty-Two Cases, More or Less, Each Containing Six Jars of Jam, Etc. v. United States,* 340 U.S. 593 (1951), defined the Court's role similarly:

> [O]ur problem is to construe what Congress has written. After all, Congress expresses its purposes by words. It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort. *Id.* at 596.

The language of the Teton Dam Authorization Act reflects the same characteristics of the statutes about which Justices Brandeis and Frankfurter wrote.

In summary, the Court of Appeals' disregard for the integrity of the plain and unambiguous congressional enactment must be corrected. The Teton Dam Authorization Act is plain, unambiguous and perfectly symmetrical; it mentions flood control nowhere, produces no absurd results, and has fulfilled completely its purpose of the construction of a federal reclamation project in southeastern Idaho. The Court of Appeals, however, has disregarded not only that straightforward nature of the statute but also the decisions of this Court regarding statutory interpretation to add judicially a flood control purpose that Congress, for whatever reason, chose not to include.

2. The Court of Appeals Erred When It Stated that Courts Examining the Immunity Granted by 33 U.S.C. § 702c have Disregarded the Language of Applicable Authorizing Statutes.

Without any citation of authority, the Court of Appeals baldly declared that courts examining the applicability of 33 U.S.C. § 702c have disregarded the language of the applicable authorizing statutes and have focused upon whether flood control actually was intended as a purpose of the project. By that statement, the Court of Appeals attempts to justify its own disregard for the integrity of the Teton Dam Authorization Act and long-acknowledged principles of statutory construction. That statement by the Court of Appeals also demonstrates its failure to comprehend that never before has a court applied the immunity to any project other than one in which flood control was expressly involved. No court before has acceded to the United States' request for immunity when the statute made no mention of flood control.

In *National Manufacturing Co. v. United States,* 210 F.2d 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954), the court was concerned with damage that resulted in conjunction with dams and levees along rivers in Kansas City, Missouri, which project Congress authorized by the Act of June 22, 1936, Pub. L. No. 74-738, 49 Stat. 1570, and which expressly was authorized for the "control of destructive flood waters and other purposes." *Id.* at 1572.

Similarly, the Act of June 22, 1936, Pub. L. No. 74-738, 49 Stat. 1570, was the congressional basis for the Peninsular Drainage District No. 2, which was the project that was the subject matter of *Clark v. United States,* 218 F.2d 446 (9th Cir. 1954).

Stover v. United States, 332 F.2d 204 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964), arose in conjunction with the Sacramento River Flood Control Project, Act of

August 28, 1937, Pub. L. No. 75-892, 50 Stat. 844, which authorized the contruction of the "Sacramento River flood control" project. *Id.* at 849.

The United States Court of Appeals for the Second Circuit dealt with the Herkimer Flood Control Project in New York in *Parks v. United States,* 370 F.2d 92 (2d Cir. 1966). Although Petitioners have been unable to locate the authorization statute for that project, its mere title removes any doubt that it was authorized and designated as a flood control project.

The Alkali Canyon Project, authorized by the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, specifically "for local flood protection," *id.* at 884, was the project underlying *McClaskey v. United States,* 386 F.2d 807 (9th Cir. 1967).

The same Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, also was the statutory authority for the construction of the Loyalhanna Flood Control Dam that was the focus of *Ponderendolph v. Derry Township,* 330 F. Supp. 1346 (W.D. Pa. 1971).

Florida East Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975) concerned the Central and Southern Florida Flood Control Project that Congress authorized by the Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1171, for the "control of destructive floodwaters." *Id.* at 1175.

Congress also expressly authorized the Waurika Dam and Reservoir for the "control of destructive flood waters," Act of October 23, 1962, Pub. L. No. 88-253, 77 Stat. 840, 841, which project became the subject of *Callaway v. United States,* 568 F. 2d 684 (10th Cir. 1978).

Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978), concerned damages resulting from the promulgation of a watershed plan pursuant to the Watershed Protection and Flood Prevention Act. Pub. l. No. 83-566, 68 Stat. 666, which referred to "floodwater" and "flood prevention or control districts." *Id.* at 666.

The Court of Appeals for the Eighth Circuit did not have to examine the federal legislation authorizing the construction and operation of the Garrison Dam in North Dakota when it decided *Taylor v. United States,* 590 F.2d 263 (8th Cir. 1979), because the aggrieved party conceded that the project was for flood control.

Most recently, the fact that the plaintiffs' complaint in *Burlison v. United States,* 627 F.2d 119 (8th Cir. 1980), demonstrated that a flood control project was involved in that case relieved the court of any need to investigate the legislation authorizing the Little River Drainage District.

In summary, in each case where courts have applied the immunity granted the United States by 33 U.S.C. § 702c, the authorizing legislation expressly stated that the project was a flood control project or expressly stated flood control as a purpose of the legislation, or the injured party acknowledged that flood control was a purpose of the project. In contrast, the legislation authorizing the Teton Dam makes no such declaration of purpose and Petitioners have acknowledged no such purpose.

3. The Court of Appeals Erred When It Applied a Statement from an Earlier Decision Regarding the Flood Control Purpose of the Teton Dam.

Among its other erroneous rationales for declaring that the Teton Dam was a flood control project, the Court of Appeals recited that in *Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974), it specifically had decided that one of the purposes of the Teton Dam was flood control, implying that such a decision collaterally estopped Petitioners from arguing otherwise. This position is erroneous because at least two of the elements of collateral estoppel are not present. This Court in *Blonder-Tongue Laboratories, Inc., v. University of*

Illinois Foundation, 402 U.S. 313 (1971), set forth a three-part test to determine the applicability of the doctrine: (1) Was there a final judgment on the merits? (2) Was the party against whom the plea is asserted a party or in privity with a party to the adjudication? (3) Was the issue decided in the prior litigation identical with the one presented in the present case?

First, it is clear that none of the Petitioners were involved in the earlier environmental litigation. It is equally clear that none of the Petitioners are in privity with any party to the earlier case. The Petitioners' lack of identity or privity with the parties in *Trout Unlimited* precludes application of collateral estoppel.

Second, the issues litigated in *Trout Unlimited* were totally unrelated to the issue now before this Court. In *Trout Unlimited*, the plaintiffs' second claim for relief alleged that the Teton Dam was built in contravention of certain flood control statutes and that any claimed flood control benefits were grossly overstated. The United States District Court for the District of Idaho dismissed that claim for relief for failure to state a claim upon which relief could be granted. The case proceeded to trial only on the first claim for relief, which alleged that the Environmental Impact Statement did not comply with the requirements of the National Environmental Protection Act. Any statements by the Court of Appeals regarding a flood control purpose of Teton Dam were unnecessary to the determination of the case. Since no one litigated the question of whether Teton Dam was a "flood control project" as contemplated by 33 U.S.C. § 702c, any statements in *Trout Unlimited* are neither controlling nor relevant in the present action.

Conclusion

The immunity that 33 U.S.C. § 702c grants the United States pertains only to liability for damages from floods or floodwaters in a congressionally designated flood control project. The Teton Dam was not such a

project, and the Court of Appeals erred in concluding that it was. The Court of Appeals erred in applying the principle of collateral estoppel to create a flood control purpose for the project. The Court of Appeals erred in disregarding the deference other courts interpreting the immunity have held toward the language of applicable statutes. Most grievously, the Court of Appeals erred by disregarding the principles of statutory construction that this Court has enunciated to protect the integrity of statutory enactments, and blatantly added a flood control purpose to the legislation authorizing the Teton Dam, a purpose Congress chose not to add.

The impact of the errors of the Court of Appeals, however, reaches far beyond the immediate pecuniary loss of the Petitioners. The decision of the Court of Appeals would allow a court to apply the immunity of 33 U.S.C. to a project if any mention is made of flood control in the course of the project's enactment. Beyond the issue of the immunity granted in 33 U.S.C. § 702c, the decision of the Court of Appeals threatens the integrity and definiteness of all legislative enactments.

Petitioners pray that this Court issue the Writ of Certiorari for all of the reasons set out in this Petition.

Respectfully submitted, this 12th day of January, 1981.

John T. Hawley
P. Craig Storti

Carl W. Harder (Counsel of Record)
HAWLEY TROXELL ENNIS & HAWLEY
P.O. Box 1617
Boise, Idaho 83701
Telephone: (208) 344-6000

Attorneys for Petitioners

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA INSURANCE COMPANY, et. al., *Plaintiffs-Appellees,* v. UNITED STATES OF AMERICA *Defendant-Appellant.*	No. 79-7219 OPINION (Filed Aug. 14, 1980)

Appeal from the United States District Court
for the District of Idaho

Before: TANG, SCHROEDER and POOLE, Circuit Judges.

SCHROEDER, Circuit Judge:

This is an action by insurance companies against the United States Government to recover more than $7,000,000 in claims paid to insureds as a result of the 1976 collapse of the Teton Dam. The sole issue presented in this interlocutory appeal is whether the suit is barred by the provisions of 33 U.S.C. § 702c, which immunizes the United States from liability for flood damage related to flood control projects. The district court certified this appeal from its order denying the Government's motion to dismiss. We accepted the appeal and now hold that the district court's order must be reversed because the United States is immune.

Congress authorized the construction of the Teton Dam in 1964 in the wake of serious flooding which occurred in 1962. The dam was part of the Bureau of

Reclamation's Teton Basin Project authorized by Pub. 616rr.[1] The enabling legislation's preamble stated multiple purposes for the project which did not expressly include flood control. However, the legislative history of the Act makes it clear that the project was at least in part intended to prevent the type of floods which had occurred in 1962. The project came to a tragic end, however, on June 5, 1976, when the partially completed dam collapsed, causing severe flooding and great damage in Idaho's Teton Basin.

Congress responded by enacting the Teton Dam Disaster Assistance Act of 1976. Pub. L. No. 94-400, 90 Stat. 1211 (1976). The Act provided direct compensation to injured parties but expressly excluded claims of insurance carriers for reimbursement of claims paid to their insureds. *Id.*, § 3(d), 90 Stat. at 1211. The Act further provided that an insurer could exercise "any right of action against the United States to which it may be entitled under any other laws for payments made to [insureds] . . ." *Id.*, § 3(f), 90 Stat. at 1212. *See also id.*, § 9(c), 90 Stat. at 1214.

The plaintiff insurance companies in this case acknowledge that they have no claim under the Teton Dam Disaster Assistance Act, but they do claim entitlement to recovery against the Goverment under another law, namely the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671 - 2680. They filed this action as subrogees of their insured's claims against the Government, alleging that the Government's design and construction of the dam was negligent and that the Government's negligence caused the dam's collapse.

The Government argues that the complaint should be dismissed because the United States is immune from

[1] The statute has since been removed from the United States Code as having limited applicability.

liability under 33 U.S.C. § 702c, which provides:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters any place . . . .

Despite the broad language of the immunity statute, it is by now well settled in this Circuit that the immunity statute applies only when the flood damage is caused by a project related to flood control, and that it does not apply when the flood damage is "wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control . . . ." *Peterson v. United States,* 367 F.2d 271, 275 (9th Cir. 1966). *Accord Graci v. United States,* 456 F.2d 20 (5th Cir. 1971). *cert. denied,* 412 U.S. 928 (1973). The question before us thus narrows to whether the flood damage here was related to government flood control activities so as to fall within the immunity provisions as they have been interpreted by the courts.

Flood control undisputably was not the exclusive purpose of the Teton Basin Project, and it may not have been a major purpose. This Court has held, however, that damage as a result of flooding from a government project fell within the immunity provision of § 702c despite the fact that the project was not exclusively devoted to flood control. *McClaskey v. United States,* 386 F.2d 807 (9th Cir. 1967). Section 702c has frequently been applied to floods stemming from multipurpose projects. *E.g., Taylor v. United States,* 590 F.2d 263 *District,* 586 F.2d 1081 (6th Cir. 1978); *Callaway v. United States,* 568 F.2d 684 (10th Cir. 1978); Nor does it matter, as plaintiffs suggest, whether the projects are administered by the Corps of Engineers, *e.g., McClaskey v. United States, supra,* The Bureau of Reclamation, *e.g., Sanborn v. United States,* 453 F. Supp. 651 (E.D. Cal. 1977); *Hedrick v. United States,* 184 F. Supp. 927 (D.N.M. 1960), or the Department of Agriculture, *e.g., Lenoir v. Porters Creek Watershed District, supra.* The policy behind § 702c, was to permit

the government to engage in a "vast construction program . . . of dikes, dams, levees, and related works," *Peterson, supra* at 275-76. That purpose would not be furthered by limiting the immunity to single purpose flood control projects, or even to projects in which flood control is a dominant goal.

The insurers assert, however, that flood control was not at all a purpose of the Teton Basin Project. They ask us to ignore the extensive legislative history indicating that flood control was very much on the minds of the members of Congress in passing the legislation. *See, e.g.,* H.R. Rep. No. 1715, 88th Cong., 2d Sess. at 3 (1964) ("The project would also provide substantial flood protection . . . ."); S. Rep. No. 1127, 88th Cong., 2d Sess. at 3 (1964) ("The disastrous flood of February 1962 dramatically reemphasized the need for the construction proposed."). The insurers would have us focus narrowly on the purposes listed in the preamble to the Act which, for some unexplained reason, omitted flood control. The insurers' position in this regard is, however, contrary to the approach which the courts have taken in focusing, not upon the language of the legislation authorizing projects, but upon whether the project was actually intended, at least in part, to control flooding. Flood control was beyond question a purpose of the Teton Basin Project. Indeed, this Court has specifically said in another contect that one of the purposes of the Teton Basin Project was flood control. *Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974).

The insurers also argue that § 702c, which was enacted in 1928 in connection with an extensive project to control flooding on the Mississippi River, was intended to apply only to projects on that river, and that the Teton Basin Project is therefore outside its scope. This argument has been raised and rejected many times, and every court to consider the issue has held that § 702c has nationwide application. *E.g., Clark v. United States,* 218 F.2d 446 (9th Cir. 1954); *Lenoir v. Porters*

Creek Watershed Dist., supra, at 1086; *National Mfg. Co. v. United States,* 210 F.2d 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954). After 26 years of consistent interpretation, it would be the proper function of Congress and not this Court to narrow the scope of the immunity.

The insurers' remaining arguments focus not on the purpose of the Teton Basin Project but on the nature of the disaster which occurred. The insurers contend that the collapse of the dam with its ensuing flood damage was caused solely by government negligence unaccompanied by any unusual natural factors, and that 702c should not bar recovery in those circumstances. Its principal support for that position is dictum in *Stover v. United States,* 204 F. Supp. 477 (N.D. Cal. 1962), *aff'd,* 332 F.2d 204 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964). In this Court's affirmance, however, we expressly disapproved the trial court's dictum that 702c would not apply to floods caused purely by negligence. The dictum has also been disapproved in other decisions. *See Burlison v. United States,* 627 F.2d 119 (8th Cir. 1980); *Lunsford v. United States,* 570 F.2d 221 (8th Cir. 1977); *Florida East Coast Railway Co. v. United States,* 519 F.2d 1184 (5th Cir. 1975); *Sanborn v. United States,* 453 F. Supp. 651 (E.D. Cal. 1977). Any flood caused by government negligence is also caused in part by the natural conditions extant at the time of the negligence: e.g., the amount of rainfull which preceded the flood and hence the amount of water being stored. To attempt to distinguish between ordinary and unusual natural conditions, as plaintiffs urge, would be a very difficult task. Such an inquiry would necessarily frustrate section 702c's purpose of permitting the government to engage in flood control without fear of liability. We agree with the Eighth Circuit that such a test would "lead the court into the morass of 'contributing causes,' 'superseding causes,' and 'interventing causes.' " *Lunsford, supra* at 228 n.13, quoting *Lunsford v. United*

States, 418 F.Supp. 1045, 1054 (D.S.D. 1976). For similar reasons we reject the insurers' contention that the Teton Dam Disaster was not a "flood" within the meaning of 702c. The immunity provision is not limited to water damage attributable to a natural diaster. *See Florida East Coast Railway Co. v. United States, supra.*

Plaintiffs also argue that since at the time the immunity statute was passed, some twenty years before the Federal Tort Claims Act, there was no governmental liability for negligence, the immunity statute could not have been intended to provide immunity for negligent conduct in connection with flooding. An equally compelling argument can be made, however, that given the existing broad language of the immunity provisions, Congress in passing the Federal Tort Claims Act should have manifested an intent to include flood damage arising out of negligence within the scope of the Federal Tort Claims Act. The legislative history is at best equivocal[2] and the matter has been resolved for our purposes by repeated decisions of this Court which have held that 702c bars suits based on negligence. *McClaskey v. United States, supra; Stover v. United States, supra; Clark v. United States, supra.*

The order of the district court is reversed and the cause is remanded with instructions to grant the Government's motion to dismiss.

[2] Plaintiffs rely on an explanation of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), contained in several of the Congressional reports on the Federal Tort Claims Act. The relevant sentence is as follows:

> This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only

> ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

H.R. Rep. No. 2245, 77th Cong., 2d Sess. at 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. at 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. at 5-6 (1946), quoted in *Dalehite v. United States*, 346 U.S. 15,29 n.21 (1953).

While this sentence does suggest that the Government may be liable for flood damage due to government negligence, it is merely an example, one of several in the paragraph, of the way in which the discretionary function exception is to operate. It does not expressly recognize the specific flood immunity of 33 U.S.C. § 702c.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AETNA INSURANCE COMPANY a corporation, *Plaintiff,*	Civil Nos. 78-4031, et al
vs.	
UNITED STATES OF AMERICA, *Defendant.*	MEMORANDUM DECISION
and consolidated cases	(Filed February 23, 1979)

All materials of record having been filed and reviewed and this matter having come regularly before the Court on February 12, 1979, for hearing on defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, it is the conclusion of the Court that defendant's motion to dismiss should be denied.

STATEMENT OF THE CASE

The failure of the Teton Dam on June 5, 1976, resulted in hundreds of millions of dollars of damage to the property of individuals and businesses in eastern Idaho. Plaintiffs are insurance companies whose insureds' property was among that damaged. Pursuant to insurance policies between them and their insureds, plaintiffs have reimbursed their insureds for the losses that the latter suffered as a result of the Teton Dam disaster.

Congress responded to the Teton Dam failure by enacting the Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211, which recites the Government's purpose to compensate fully all deaths, personal injuries, and losses of property arising from the failure of the dam. Insurance companies, however, are explicitly excepted from recovery under the Act for the payments they have made to their insureds. The Act provides, however, that an insurance company can still exercise "any right of action against the United States to which it may be entitled under any other laws" for payments made to its insureds. Pub. L. No. 94-400, § 3(f), 90 Stat. at 1212.

Accordingly, plaintiffs instituted these suits pursuant to the Federal Tort Claims Act of June 25, 1948, 62 Stat. 982, 28 U.S.C. §§1346(b), 2671 *et seq.*, as amended. The United States of America responded to plaintiffs' suits in cases numbered 78-4031, 78-4032, and 78-4033 by filing its Rule 12(b) motion to dismiss, based upon the grounds that the court lacks jurisdiction over the subject matter of the action and that the complaints of the plaintiffs fail to state a claim upon which relief can be granted.

STATEMENT OF THE ISSUES

Defendant's motion to dismiss is grounded specifically upon the argument that plaintiffs' actions are barred by the provisions of Section 3 of the Flood Control Act of 1928, as codified at 33 U.S.C. § 702c, which provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . .

The major issue before the Court is whether Section 702c immunity applies to the Teton Dam failure in the absence of any Congressional action designating the Teton Basin Project a flood control project.

DISCUSSION

Inasmuch as defendants have filed a motion to dismiss, the allegations of the plaintiffs' complaints must be taken as true for the purposes of the motion, *Miree v. DeKalb County,* 433 U.S. 25, 27 n.2 (1977), whether it be a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, *Walling v. Beverly Enterprises Corp.,* 476 F.2d 393, 395-96 (9th Cir. 1973), or under Rule 12 (b)(6) for failure to state a claim upon which relief can be granted, *California Dump Truck Owners Ass'n v. Associated General Contractors of America,* 562 F.2d 607, 614 (9th Cir. 1977).

The Teton Dam Authorization Act of September 7, 1964, Pub. L. 88-583, contains no reference to flood control, either as published at 78 Stat. 925 or 43 U.S.C. §§ 616nn through 616rr. In the first sentence of that Act, Congress explicitly provided all the purposes of the Act, and declared in full:

> In order [1] to assist in the *irrigation* of arid and semiarid lands in the upper Snake River Valley, Idaho, [2] to provide facilities for river *power* opportunities created thereby and, as incidents to the foregoing purposes [3] to enhance *recreational* opportunities and [4] provide for the *conservation* and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. 43 U.S.C. §616nn (emphasis added).

A review of federal case law reveals that Section 702c immunity does not apply to damages "unconnected with flood control projects," *Graci v. United States,* 456 F.2d 20, 27 (5th Cir. 1971), or "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control," *Peterson v. United States,* 367 F.2d 271, 275 (9th Cir. 1966). Whenever a federal court

has applied Section 702c, the project at issue was Congressionally designated a flood control project supervised by the Army Corps of Engineers. Despite the absence of flood control language in the authorization statute and the fact that Congress designated the Teton Basin Project a reclamation project and has not appropriated any federal funds specifically for flood control under the Authorization Act, the Government attempts to avail itself of Section 702c immunity by asking the Court to look to the pre-enactment legislative history where flood control was listed among the Project's purposes and insert flood control as a purpose in the Teton Dam Authorization Act. H. Rept. No. 1715, 88th Cong., 2d Sess., at 3 (1964). The Court finds the language of the Act to be clear and unambiguous in its statement of purposes. Moreover, a judicial insertion of flood control into the Authorization Act would not convert a reclamation project into a flood control project. The Court is not inclined to insert language used in the preliminary legislative stages which was ultimately omitted from a bill in its approved and signed form. *Marshall Field & Co., v. Clark,* 143 U.S. 649 (1892).

Inasmuch as Congress designated the Teton Basin Project a reclamation project rather than a flood control project and flood control was not enumerated among the purposes of the Project, the Court must look for other reasons for applying Section 702c immunity to the Teton Dam disaster. There is no evidence before the Court that Congress expressly appropriated funds for flood control. Pub. L. No. 93-393, 88 Stat. 785, *Peterson v. United States, supra,* at 275. There is no evidence before the Court that the Army Corps of Engineers supervised the Teton Basin Project or expended Congressionally appropriated funds for flood control on the Project. *Id.* And finally, there is no evidence before the Court that the alleged negligent conduct of the defendant through its agents was the result of any effort to control flooding at the time of disaster.

In the absence of (1) Congressional flood control designation, (2) any express flood control purpose stated in the Authorization Act., (3) any Congressional flood control appropriation, (4) any expenditures or supervision by the Army Corps of Engineers, and (5) evidence that the water damage resulted from allegedly negligent conduct aimed at controlling flood waters on June 5, 1976, the Court finds no basis for Section 702c in order to bar defendant's potential liability. Had one of the above conditions been present, the Court may have reached a different result.

There are substantial arguments on each side of the question concerning the scope of application of Section 702c without any clear and controlling decisions by either the Ninth Circuit Court of Appeals or the United States Supreme Court. If the defendant were successful in appealing this decision, it would completely terminate all 35 actions consolidated before the Court in this matter. Therefore, it appears to the Court that this is a proper case to be certified for appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 23rd day of February, 1979.

MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AETNA INSURANCE COMPANY, a corporation, *Plaintiff,*	)	
-vs-	)	Civil Nos. 78-4031, et al
THE UNITED STATES OF AMERICA *Defendant.*	)	O R D E R
and consolidated cases	)	

The Court, having reviewed the materials of record and having received oral argument, finds no basis in fact or law which brings this matter within the scope of 33 U.S.C. § 702c.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that this matter be, and the same is hereby, certified for appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 23rd day of February, 1979.

MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA INSURANCE COMPANY, et. al.,	)	
Paintiffs-Appellees,	)	No. 79-7219
vs.	)	
UNITED STATES OF AMERICA,	)	DC CV 78-4031,
Defendant-Appellant.	)	et al., MJC

APPEAL from the United States District Court for the District of IDAHO (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of IDAHO (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with instructions.

Costs in this court in favor of the appellant and against the appellees.

Costs:	
BRIEF FOR THE APPELLEES	$47.50
TOTAL	$47.50

Filed and entered August 14, 1980.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA INSURANCE COMPANY, et al., *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA *Defendant-Appellant.*	)	No. 79-7219 ORDER (Entered October 14, 1980)

Before: TANG, SCHROEDER and POOLE, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix E

The Mississippi River Flood Control Act of 1928, Chapter 569, Section 3, 45 Stat. 535, 33 U.S.C. §702c

§702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights.

Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of Sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 702*l*, and 702m of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of Sections 702a, 702b, to 702d, 702e to 702g, 702h to 702j, 702k, 702*l*, and 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not

economically justified or because such construction would unreasonably restrect the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the chief of Engineers to institute proceeds on behld of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Appendix F

TETON DAM AUTHORIZATION ACT

PUBLIC LAW 88-583-SEPT. 7, 1964

AN ACT

To provide for the construction of the Lower Teton division of the Teton Basin Federal reclamation project, Idaho, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, in order to assist in the irrigation of arid and semiarid lands in the upper Snake River Valley, Idaho, to provide facilities for river power opportunities created thereby and, as incidents to the foregoing purposes, to enhance recreational opportunities and provide for the conservation and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. The principal engineering features of said project shall be a dam and reservoir at the Fremont site, a pumping plant, powerplant, canals and water distribution facilities, ground water development, and related facilities in the upper Snake River Valley, Idaho. In the construction, operation, and maintenance of the said project and project works the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof and supplementary thereto). The project shall be operated consistent with the existing agreements as to storage rights in the Federal reclamation reservoirs in the upper Snake River Basin.

Sec. 2. The period provided in subsection (d) of section 9 of the Reclamation Project Act of 1939, as amended, for repayment of construction costs properly

allocable to any block of lands and assigned to be repaid by the irrigators may be extended to fifty years, exclusive of a development period, from the time water is first delivered to that block, or as near that number of years as is consistent with the adoption and operation of a repayment formula as therein provided. Costs allocated to irrigation in excess of the amount determined by the Secretary to be within the ability of the irrigators to repay within a fifty-year period shall be returned to the reclamation fund from revenues derived by the Secretary from the disposition of power marketed through the Bonneville Power Administration and attributable to Federal projects in Idaho.

Sec. 3. (a) The Secretary is authorized to construct, operate, and maintain or otherwise provide for basic public outdoor recreation facilities, to acquire or otherwise to include within the division area such adjacent lands or interests therein as are necessary for public recreation use, to allocate water and reservoir capacity to recreation, and to provide for the public use and enjoyment of division lands, facilities, and water areas in a manner coordinated with the other division functions. The Secretary is authorized to enter into agreements with Federal agencies or State or local public bodies for the operation, maintenance, or additional development of division lands or facilities, or to dispose of division lands or facilities to Federal agencies or State or local public bodies by lease, transfer, conveyance, or exchange upon such terms and conditions as will best promote the development and operation of such lands and facilities in the public interest for recreation purposes. The costs of the aforesaid undertakings, including costs of investigation, planning, Federal operation and maintenance, shall be nonreimbursable. Nothing herein shall limit the authority of the Secretary granted by existing provisions of law relating to recreation development of water resource projects or to disposition of public lands for recreation purposes.

(b) Costs of means and measures to prevent loss of and damage to fish and wildlife resources shall be considered as project costs and allocated as may be appropriate among the other division functions.

Sec. 4. (a) The Secretary is authorized to amend contracts heretofore made under the Acts of September 30, 1950 (64 Stat. 1083), and of August 31, 1954 (68 Stat. 1026), whereby the water users assumed an obligation for winter power replacement based on the winter water savings program at the Minidoka powerplant to relieve the contractors ratably by one-third of that obligation, and to make new contracts under these Acts on a like basis. To the extent such annual obligations are reduced, the cost thereof shall be included in the cost to be absorbed by the power operations of the Federal power system in Idaho.

(b) The actual construction of the facilities herein authorized shall not be undertaken until at least 80 per centum of the conservation capacity in Fremont Reservoir is under subscription, nor until negotiations have been undertaken in accordance with the provisions of (a) of this section.

(c) No construction shall be undertaken on facilities of the Lower Teton division which are required solely to provide a full water supply to lands in the Rexburg Bench area until the Secretary has submitted his report and finding of feasibility on this phase of the division to the President and to the Congress.

Sec. 5. There is hereby authorized to be appropriated for the construction of the Lower Teton division of the Teton Basin Federal reclamation project, the sum of $52,000,000, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the types of construction involved therein, and, in addition thereto, such sums as may be required to operate and maintain said division.

Approved September 7, 1964.

Appendix G

TETON DAM DISASTER ASSISTANCE ACT

PUBLIC LAW 94-400-SEPT. 7, 1976

AN ACT

To authorize the Secretary of the Interior to make compensation for damages arising out of the failure of the Teton Dam a feature of the Teton Basin Federal reclamation project in Idaho, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that without regard to the proximate cause of the failure of the Teton Dam, it is the purpose of the United States to fully compensate any and all persons, for the losses sustained by reason of the failure of said dam. The purposes of this Act are (1) to provide just compensation for the deaths, personal injuries and losses of property, including the destruction and damage to irrigation works, resulting from the failure on June 5, 1976, of the Teton Dam in the State of Idaho, and (2) to provide for the expeditious consideration and settlement of claims for such deaths, personal injuries, and property losses.

Sec. 2. All persons who suffered death, personal injury, or loss of property directly resulting from the failure of June 5, 1976, of the Teton Dam of the Lower Teton Division of the Teton Basin Federal reclamation project which was authorized to be constructed by the Act of September 7, 1964 (78 Stat. 925) shall be entitled to receive from the United States full compensation for such death, personal injury, or loss of property. Claimants shall submit their claims in writing to the Secretary, under such regulations as he prescribes, within two years after the date on which the regulations required by section 5 are published in the Federal

Register. Claims based on death shall be submitted only by duly authorized legal representatives.

Sec. 3.(a) The Secretary of the Interior, or his designee for the purpose, acting on behalf of the United States, is hereby authorized to and shall investigate, consider, ascertain, adjust, determine, and settle any claim for money damages asserted under section 2. Except as otherwise provided herein, the laws of the State of Idaho shall apply: *Provided,* That determinations, awards, and settlements under this Act shall be limited to actual or compensatory damages measured by the pecuniary injuries or loss involved and shall not include interest prior to settlement or punitive damages.

(b) In determining the amount to be awarded under this Act the Secretary shall reduce any such amount by an amount equal to the total of insurance benefits (except life insurance benefits) or other payments or settlements of any nature previously paid with respect to such death claims, personal injury, or property loss.

(c) Payments approved by the Secretary under this Act on death, personal injury, and property loss claims, shall not be subject to insurance subrogation claims in any respect under this Act but without prejudice under other laws as provided in subsection (f).

(d) The Secretary shall not include in an award any amount for reimbursement to any insurance fund for loss payments made by such company or fund.

(e) Except as to the United States, no claim cognizable under the Act shall be assigned or transferred.

(f) The acceptance by the claimant of any award, compromise, or settlement under this Act, except an advance or partial payment made under section 4(c), shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States by reason of the same subject matter. A release shall not, however, prevent an insurer with rights as a subrogee under its own name or that of the claimant

from exercising any right of action against the United States to which it may be entitled under any other laws for payments made to the claimant for a loss arising from the subject matter.

(g) Any claim for damages which may be payable in whole or in part by a claimant's insurer, shall not be paid by the Secretary unless and until the claimant provides written proof that the insurer has denied the claim or has failed to approve or deny such claim within six months of its presentment, and the claimant assigns to the United States his rights against the insurer with respect to such claim. Upon the acceptance of any payment or settlement under this Act, the claimant shall assign to the United States any rights of action he has or may have against any other third party, including an insurer.

Sec. 4.(a) In the determination and settlement of claims asserted under this Act, the Secretary shall limit himself to the determination of—

(1) whether the losses sustained directly resulted from the failure of the Teton Dam on June 5, 1976;

(2) the amounts to be allowed and paid pursuant to this Act; and

(3) the persons entitled to receive the same.

(b) The Secretary shall determine and fix the amount of awards, if any, in each claim within twelve months from the date on which the claim was submitted.

(c) At the request of a claimant, the Secretary is authorized to make advance or partial payments prior to final settlement of a claim, including final settlement or any portion or aspect of a claim determined to be logically severable. Such advance or partial payments shall be made available under regulations promulgated by the Secretary under section 5, which regulations shall include, but not be limited to, provisions for such payments where the Secretary determines that to delay payment until final settlement of the claim would impose a substantial hardship on such claimant. When a claimant

pursues a remedy as provided for in section 9 of this Act, he shall be permitted to retain such advance or partial payments under a final court decision on the merits.

(d) Payments may be made for compensation for direct investments made in on-farm structural facilities in anticipation of service from the Teton Reservoir to the extent that such facilities are unuseable or are diminished in value by the denial of such service.

Sec. 5. Notwithstanding any other provision of law, the Secretary shall within fifteen days after the enactment of this Act promulgate and publish in the Federal Register, final regulations and procedures for the handling of the claims authorized in section 2 of this Act. The Secretary shall also cause to be published, in newspapers with general circulation in the State of Idaho, an explanation of the rights conferred by this Act and the procedural and other requirements imposed by the rules of procedure promulgated by him. Such explanation shall be in clear, concise, and easily understandable language. In addition, the Secretary shall also disseminate such explanation concerning such rights and procedures, and other data helpful to claimants, in the State of Idaho, by means of brochures, pamphlets, radio, television, and other media likely to reach prospective claimants.

Sec. 6. The claims program established by this Act shall, to the extent practicable, be coordinated with other disaster relief operations conducted by other Federal agencies under the Disaster Relief Act of 1974 (42 U.S.C. 5121) and other provisions of law. The Secretary shall consult with the heads of such other Federal agencies, and shall, as he deems necessary, consistent with the expeditious determination of claims hereunder, make use of information developed by such agencies. The heads of all other Federal agencies performing disaster relief functions under the Disaster Relief Act of 1974 and other Federal authorities are hereby authorized and directed to provide the

Secretary, or his designee, such information and records as the Secretary or his designee shall deem necessary for the administration of this Act.

Sec. 7. In order to expedite the repair and restoration of irrigation facilities damaged as a direct result of the failure of the Teton Dam, the Secretary is authorized and directed to enter into agreements with the owners of such facilities to finance the repair or reconstruction thereof, to the standards and conditions existing immediately prior to the failure of Teton Dam, either by direct payment or through construction contracts administered by the Bureau of Reclamation to the extent the cost of repairs or constructions are not covered by insurance. The cost of such repairs or reconstruction shall be non-reimbursable.

Sec. 8. At the end of the year following approval of this Act and each year thereafter until the completion of the claims program, the Secretary shall make an annual report to the Congress of all claims submitted to him under this Act stating the name of each claimant, the amount claimed, a brief description of the claim, and the status or disposition of the claim including the amount of each administrative payment and award under the Act.

Sec. 9.(a) An action shall not be instituted in any court of the United States upon a claim against the United States which is included in a claim submitted under this Act until the Secretary or his designee has made a final disposition of the pending claim. A pending claim may be withdrawn from consideration prior to final decision upon fifteen days written notice, and such withdrawal shall be deemed an abandonment of the claim for all purposes under this Act. After withdrawal of a claim or after the final decision of the Secretary of his designee on a claim under this Act, a claimant may elect to assert said claim or institute an action thereon against the United States in any court of competent jurisdiction under any other provision of applicable law,

and upon such election there shall be no further consideration or proceedings on the claim under this Act.

(b) Any claimant aggrieved by a final decision of the Secretary under this Act may file within sixty days from the date of such decision with the United States District Court for the District of Idaho a petition praying that such decision be modified or set aside in whole or in part. The court shall hear such appeal on the record made before the Secretary. The filing of such an appeal shall constitute an election of remedies. The decision of the Secreatry incorporating his findings of fact therein, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(c) Except to the extent otherwise herein provided, nothing in this Act shall be construed to prevent any claimant under this Act from exercising any rights to which he may be entitled under any other provisions of law.

(d) Attorney and agent fees shall be paid out of the awards hereunder. No attorney or agent on account of services rendered in connection with each claim shall receive in excess of 10 per centum of the amount paid in connection therewith, any contract to the contrary notwithstanding. Whoever violates this subsection shall be fined a sum not to exceed $10,000.

Sec. 10. For the purposes of this Act, the term "persons" means any individual, Indian, Indian tribe, corporation, partnership, company, municipality, township, association or other non-Federal entity.

Sec. 11. If any particular provision of this Act or the application thereof to any person or circumstance, is held invalid, the other provisions of this Act shall not be affected thereby.

Sec. 12. There are hereby authorized to be appropriated such funds as may be required to carry out the purposes of this Act.

Approved September 7, 1976.

see 80

1137

see 80

1145